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11 Attorneys for Respondent  
12 BROWNING-FERRIS INDUSTRIES  
13 OF CALIFORNIA, INC.

14 BEFORE THE HEARING BOARD OF THE  
15 SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

16 In the Matter of

CASE NO. 3448-14

17 SOUTH COAST AIR QUALITY  
18 MANAGEMENT DISTRICT,

19 *Petitioner,*

20 vs.

21 BROWNING-FERRIS INDUSTRIES  
22 OF CALIFORNIA, INC., a California  
23 Corporation and wholly-owned subsidiary of  
24 REPUBLIC SERVICES, INC., a California  
25 Corporation, dba SUNSHINE CANYON  
26 LANDFILL,

27 [Facility ID No. 49111]

28 *Respondent.*

DECLARATION OF THOMAS M.  
BRUEN IN SUPPORT OF ISSUANCE OF  
SUBPOENA AND SUBPOENA DUCES  
TECUM TO CUSTODIAN OF RECORDS  
OF SOUTH COAST AIR QUALITY  
MANAGEMENT DISTRICT

Health and Safety Code § 41700 and  
District Rule 402

Hearing Date: August 27, 2016

Time: 9:00 a.m.

Place: Valley Academy of Arts &  
Sciences, 10445 Balboa Blvd., Granada  
Hills, CA 91334

Thomas M. Bruen declares:

1. I am an attorney licensed to practice in the State of California. I am one of the attorneys for Respondent in the above-captioned proceeding. I am making this Declaration pursuant to Hearing Board Rule 8(a)(4) in support of Respondent's request that the Subpoena and Subpoena

1 Duces Tecum, filed concurrently herewith, to be issued to the Custodian of Records of the South  
2 Coast Air Quality Management District.

3 2. **Information Is Relevant:** The information requested by the Subpoena and  
4 Subpoena Duces Tecum is relevant and material to the subject matter of the District's Petition for  
5 Abatement Order in this proceeding, and Respondent's defenses thereto, as explained more fully  
6 below.

7 3. **Information Not Privileged.** To the best of my knowledge, the information  
8 requested is not subject to the attorney-client privilege or any other privilege. The intent of the  
9 subpoena is not to request the production of confidential communications between District counsel  
10 and District staff. It is Respondent's intent not to seek the disclosure of privileged information,  
11 although if a privilege other than the attorney-client privilege is claimed as a reason not to produce  
12 requested documents, Respondent requests that the Hearing Board require the District to file and  
13 serve a privilege log listing the title, author, all recipients, general statement of contents or subject  
14 matter, and date of any document or electronic file the District refuses to produce on the grounds of  
15 privilege and identify the privilege being asserted as to each such document and file.

16 4. **No Undue Burden.** There should not be any undue burden imposed on the District  
17 in producing the documents and electronic files requested by the Subpoena Duces Tecum.  
18 Respondent's counsel served the District with two Public Records Act requests for the same  
19 categories of information set forth in this Subpoena Duces Tecum on June 21 and July 20, 2016,  
20 respectively, and so the District has had sufficient time to determine if the production of the  
21 requested records would impose any undue burden on the District. The Public Records Unit of the  
22 District has not advised the undersigned that any of these requests impose any undue burden on the  
23 District. The District has declined to produce the names and addresses of complainants making  
24 complaints to the District, including those complaints alleged in paragraph 8 of the Petition, but this  
25 refusal has been on the grounds of the alleged confidentiality of this information and not on the  
26 grounds of undue burden. Moreover, the District has previously produced un-redacted complaints  
27 records regarding odor complaints about the Sunshine Canyon Landfill through February, 2014, in  
28 the pending class action lawsuit against Respondent. The District made this prior production of

1 complaint records because the production was compelled over the District's objection, by an order  
2 of Superior Court Judge Kenneth Freeman in that case. Apart from the complaint records, the  
3 District's Public Records Unit has indicated it would be producing the requested documents.  
4 Further, Mr. Sanchez has indicated the District would produce certain unredacted complaint  
5 records, but the full extent and timing of this production is currently unknown. However, a  
6 subpoena and subpoena duces Tecum is necessary to ensure that all requested records are delivered  
7 to Responded and Respondent's counsel at the outset of the hearings in this proceeding, so that  
8 Respondent can adequately prepare is defense. This far, no records have been received from the  
9 Public Records Unit in response to either of Respondent's Public Records Act requests.

10 5. **Belaire Process.** In connection with the Respondents' subpoena of complain  
11 records, Respondents have previously proposed to District counsel, and hereby propose to the  
12 Hearing Board, that the Hearing Board order the District to produce the names and address of  
13 complaints who filed odor complains with the District from and afrer March 1, 2014, pursuant to  
14 the *Belaire* opt out procedure employed pursuant to Judge Kenneth Freeman's order in the *Michaely*  
15 v. *BFIC* class action lawsuit. A copy of Judge Freeman's order is attached hereto as Exhibit 1.  
16 While we appreciate the *Belaire* process will take several weeks to implement, this can be done  
17 while holding the hearing proceeding record open while the complaint data is being produced.

18 6. **Further Details on Relevancy.**

19 **Testimony Descriptiuon:**

- 20 A. The nature and extent of the search conducted by the Custodian of Records of the  
21 SCAQMD for the records requested by this Subpoena.
- 22 B. Whether any records requested in this Subpoena have been lost or destroyed.
- 23 C. The document retention policy of the SCAQMD as it relates to any documents requested  
24 by this subpoena that have been lost or destroyed.

25 **Relevance:**

26 The categories of testimony are relevant to determine if the SCAQMD has complied with  
27 the subpoena duces tecum, to identify any additional documents or files that should be produced, to  
28 identify what documents or files have been withheld from production per the subpoena, and to

1 identify what documents or files, if any, have been lost or destroyed. If the District has lost or  
2 destroyed documents or files, or refuses to produce them, Respondents will argue that the Hearing  
3 Board should infer that the documents or files, if they were produced, would support Respondents'  
4 contentions as to what those documents would show.

5  
6 **June 21, 2016 Public Records Act Request:**

7 **Requested Documents:**

8 1. All RECORDS (as used herein, the term "RECORDS" means "Writing" as that term is  
9 defined in California Evidence Code section 250, and includes printed and electronically stored  
10 information) constituting or referring to odor complaints pertaining to the Sunshine Canyon Landfill  
11 from January 1, 2008 to February 28, 2014.

12 2. All RECORDS containing the complainant names, addresses, phone numbers, time  
13 and/or date of complaint, and/or contents of written or verbal complaints pertaining to the Sunshine  
14 Canyon Landfill from January 1, 2008 February 28, 2014.

15 3. All recordings and transcriptions of recordings of phone calls received by the 1-800-  
16 CUT-SMOG phone line pertaining to the Sunshine Canyon Landfill from January 1, 2008 to  
17 February 28, 2014.

18 4. All RECORDS of complaints reported to the SCAQMD online reporting system  
19 pertaining to the Sunshine Canyon Landfill from January 1, 2008 to February 28, 2014.

20 5. All affidavits and declarations containing or relating to odor complaints pertaining to the  
21 Sunshine Canyon Landfill from January 1, 2008 to February 28, 2014.

22 6. All RECORDS constituting or referring to odor complaints pertaining to the Sunshine  
23 Canyon Landfill from February 28, 2014 to the present.

24 7. All RECORDS containing the complainant names, addresses, phone numbers, time  
25 and/or date of complaint, and/or contents of written or verbal complaints pertaining to the Sunshine  
26 Canyon Landfill from February 28, 2014 to the present.

27 8. All recordings and transcriptions of recordings of phone calls received by the 1-800-  
28 CUT-SMOG phone line pertaining to the Sunshine Canyon Landfill from February 28, 2014 to the  
present.

1           9. All RECORDS of complaints reported to the SCAQMD online reporting system  
2           pertaining to the Sunshine Canyon Landfill from February 28, 2014 to the present.

3           10. All affidavits and declarations containing or relating to odor complaints pertaining to the  
4           Sunshine Canyon Landfill from February 28, 2014 to the present.

5           **Relevance:**

6                       These documents and files are relevant for several reasons:  
7

8           Respondents contend that a relatively small number of well organized persons, using  
9           email and phone tree alert systems, are generating repeated and multiple odor complaints to the  
10          District for reasons unrelated to the actual intensity or duration of odors, and they have called in to  
11          the District the large majority of odor complaints about the Landfill. The actual number of  
12          individuals making complaints is relatively small compared with the population of the Granada  
13          Hills community. The identity of complainants will reveal that many complianants have ulterior  
14          motives (other than the presence, strength and duration of odors) to lodge complaints with the  
15          District, including the names of plaintiffs and other persons who have retained class action  
16          atrorneys to represent them and who have told by their attorneys to contine to call in odor  
17          complaints to keep the complaint numbers high, and/or long term opponents of the landfill who are  
18          calling in odors complaints in an effort to close the landfill which they have always opposed. We  
19          know this from the analysis of complaint records produced to us by the District in the *Michaely*  
20          class action lawsuit. This data will also show the addresses of persons who are complaining about  
21          the landfill who do not live near the landfill, but are calling in complaints because they were  
22          exposed to alleged odors for a very short duration, and thus would not ordinarily be allowed to  
23          complain about air emissions from other sources per District rules and practices. Such evidence  
24          would tend to show the District is not applying its rules even-handedly. Finally, this evidence is  
25          necessary to allow Resppondents' to cross examine members of the public whop testify at the public  
26          comment portion of the Hearing Board hearings, as well as representatives of the District and of  
27          other agencies.

1  
2 July 20, 2016 Public Records Act Request

3 Requested Documents:

4 11. All procedures, policies, rules, regulations, manuals, instructions, guidelines, charts,  
5 protocols, tables and other RECORDS referring or relating to the standards used by the DISTRICT  
6 (as used herein, the term "DISTRICT" means the South Coast Air Quality Management District and  
7 its employees, agents and consultants) to determine when odors constitute a nuisance within the  
8 meaning of Health and Safety Code section 41700 and/or District Rule 402.

9 12. All procedures, policies, rules, regulations, manuals, instructions, guidelines, charts,  
10 protocols, tables and other RECORDS referring or relating to the standards used by the DISTRICT  
11 to determine when odors do not constitute a nuisance within the meaning of Health and Safety Code  
12 section 41700 and/or District Rule 402.

13 13. All procedures, policies, rules, regulations, manuals, instructions, guidelines, charts,  
14 protocols, tables and other RECORDS referring or relating to whether any odors generated at the  
15 Sunshine Canyon Landfill may constitute a nuisance within the meaning of Health and Safety Code  
16 section 41700 and/or District Rule 402.

17 14. All procedures, policies, rules, regulations, manuals, instructions, guidelines, charts,  
18 protocols, tables and other RECORDS referring or relating what constitutes an "air contaminant" or  
19 "other material" within the meaning of Health and Safety Code section 41700 and District Rule  
20 402.

21 15. All RECORDS and COMMUNICATIONS (as used herein, the term  
22 "COMMUNICATIONS" means and includes all letters, correspondence, transmittals of documents,  
23 emails, email attachments, reports, memoranda, and all other forms of transmitting information  
24 from one person to another, and including whether the information is transmitted electronically, by  
25 mail, personal delivery or overnight delivery) referring or relating to the document attached hereto  
26 as Exhibit A, including but not limited to its source, formulation, creation, drafting, authorship,  
27 implementation and/or enforcement.

28 16. All RECORDS and COMMUNICATIONS referring or relating to the DISTRICT's  
standards, practices and/or procedures for issuing Notices of Violation under District Rule 402.

17. All RECORDS and COMMUNICATIONS referring or relating to the DISTRICT's  
standards, practices and/or procedures for issuing Notices of Violation for odors under District Rule  
402.

1 18. All RECORDS and COMMUNICATIONS referring or relating to whether the  
2 DISTRICT changed its standards, practices and/or procedures for issuing Notices of Violation  
3 under District Rule 402 with respect to odor complaints from a parent whose child attends the Van  
4 Gogh elementary school.

5 19. All RECORDS and COMMUNICATIONS referring or relating to whether the  
6 DISTRICT changed its standards, practices and/or procedures for issuing Notices of Violation  
7 under District Rule 402 with respect to odor complaints regarding the Sunshine Canyon Landfill.

8 20. All RECORDS and COMMUNICATIONS referring or relating to whether the  
9 DISTRICT changed its standards, practices and/or procedures for issuing Notices of Violation  
10 under District Rule 402 with respect to odor complaints from persons who do not complain of odors  
11 at their residence.

12 21. All COMMUNICATIONS between the DISTRICT and Larry Israel regarding Notices of  
13 Violation issued by Mr. Israel pertaining to the Sunshine Canyon Landfill.

14 **Relevance:**

15 The foregoing requests 11 through 21, inclusive, are relevant because they seek evidence  
16 of the District rules, procedures and practices in enforcing its nuisance and odor nuisance rules and  
17 regulations and Health and Safety Code section 41700—the very issues that are the subject of this  
18 proceeding. Respondent contends the District is not following its own published rules and  
19 regulations in confirming odor complaints and issuing Notices of Violation to Sunshine Canyon;  
20 that the District's practices at Sunshine Canyon are being made up on an *ad hoc* basis and are  
21 exclusively applied to Sunshine Canyon and not other air emission sources. The requested  
22 documents and files are relevant to whether the NOV's regarding Sunshine Canyon were properly  
23 issued in accordance with the rule of law, and whether they represent a denial of procedural and  
24 substantive due process and equal protection as to Respondents.

25 **Requested Documents:**

26 22. All phone records showing records of telephone COMMUNICATIONS between Larry  
27 Israel and persons making odor complaints pertaining to the Sunshine Canyon Landfill.

28 23. All RECORDS and COMMUNICATIONS referring or relating to the DISTRICT's  
payment of overtime or other additional compensation or benefits to Larry Israel for Mr. Israel's

1 time spent responding to odor complaints pertaining to the Sunshine Canyon Landfill.

2 **Relevance:**

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4 The documents and files are relevant to show the interactions between Inspector  
5 Larry Israel and odor complainants, including the plaintiffs in the class action lawsuit. The  
6 documents and files seek evidence that goes to the credibility and potential bias on the part of the  
7 inspector. The overtime records will show that Inspector Israel earns overtime pay, and the amount  
8 of that pay, in responding to odor complaints at the Landfill, which provides the inspector with a  
9 financial incentive to confirm such complaints and issued NOVs.

10 **Requested Documents:**

11  
12 24. All RECORDS and COMMUNICATIONS referring or relating to any air samples taken  
13 by the DISTRICT pertaining to the Sunshine Canyon Landfill.

14 25. All RECORDS and COMMUNICATIONS referring or relating to any nasal ranger  
15 readings taken by the DISTRICT pertaining to the Sunshine Canyon Landfill.

16 26. All RECORDS and COMMUNICATIONS referring or relating to any Tedlar "Grab  
17 Bag" samples taken by the DISTRICT pertaining to the Sunshine Canyon Landfill.

18 27. All RECORDS and COMMUNICATIONS referring or relating to any hydrogen sulfide  
19 (H<sub>2</sub>S) readings taken by the DISTRICT pertaining to the Sunshine Canyon Landfill or at any  
20 location within a two-mile radius of the Sunshine Canyon Landfill.

21 28. All RECORDS and COMMUNICATIONS referring or relating to any chemical analyses  
22 of air emissions pertaining to the Sunshine Canyon Landfill.

23 29. All RECORDS and COMMUNICATIONS referring or relating to any assessments or  
24 analyses by the DISTRICT of health risks allegedly associated with any air emissions from the  
25 Sunshine Canyon Landfill.

26 30. All RECORDS and COMMUNICATIONS referring or relating to whether the  
27 DISTRICT has used any objective or scientific means to measure the intensity and/or duration of  
28 odors alleged to be associated with the Sunshine Canyon Landfill.



1 **Relevance:**

2           These documents are relevant to Respondents' contention that all of the scientific and  
3 objective evidence regarding air emissions and odors from Sunshine Canyon show the Landfill is  
4 not creating any measurable air emissions or odors that are adversely impacting the Granada Hills  
5 community. This evidence will also rebut the allegations made in the Petition that objective  
6 measurements show the landfill surface is not creating excess air emissions.  
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8 **Requested Documents:**

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10           31. All RECORDS and COMMUNICATIONS referring or relating to any work performed  
11 by Dr. Ramin Yasdani at the request of the DISTRICT relating to the Sunshine Canyon Landfill,  
12 including any proposals, work plans, test data, laboratory analyses, initial recommendations,  
13 changes or alterations in reports or recommendations, and draft or final reports.

14           32. All RECORDS and COMMUNICATIONS referring or relating to any work performed  
15 by Hydro Geo Chem, Inc. at the request of the DISTRICT and/or Dr. Ramin Yazdani relating to the  
16 Sunshine Canyon Landfill, including any proposals, work plans, test data, laboratory analyses,  
17 initial recommendations, changes or alterations in reports or recommendations, and draft or final  
18 reports.

18 **Relevance:**

19           The Petition (paragraph 19) alleges that the District has obtained two expert reports,  
20 which the Petition says portions of the requested Abatement Order are based on. These requests  
21 seek documents relevant to the procurement and drafting of these reports, and any revisions  
22 requested by the District or other parties to such reports. These requests also seek any laboratory  
23 test results and other data that were obtained in the scope of work involving the preparation of these  
24 reports.  
25

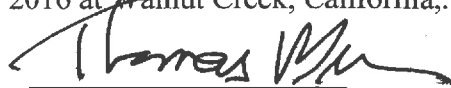
26 **Requested Documents:**

27           33. All RECORDS and COMMUNICATIONS referring or relating to the DISTRICT's  
28 consideration of and/or response to the letter from Thomas Bruen to Nicholas Sanchez dated  
January 9, 2013, attached hereto as Exhibit B.

1  
2 **Relevance:**

3           This request seeks any documents and files relating to the District's consideration, if any,  
4 of several requests made by counsel for Respondent BFIC in January of 2013, regarding the  
5 District's procedures for confirming odor complaints and issuing NOVs to Sunshine. These request  
6 include a request that the District use nasal rangers and/or other scientific and objective odor  
7 measuemetn devices to determine the true intensity of alleged odors coming from the Landfill. The  
8 documents are therefore central to the issues in this proceedng.

9  
10           I declare under penalty of perjury of the laws of the State of California that the foregoing is  
11 true and correct. Executed this 19 day of August, 2016 at Walnut Creek, California,.

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13 Thomas M. Bruen  
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MICHAELY V. BROWNING-FERRIS INDUSTRIES

Case No.: BC497125

Hearing Date: 3/5/14

Department 310

MAR 05 2014

Sherril R. Carter, Executive Officer/Clerk  
By [Signature], Deputy  
Koranne Adiga

MOTION TO COMPEL PRODUCTION OF BUSINESS RECORDS BY SOUTH  
COAST AIR DISTRICT

Final Order  
~~TENTATIVE~~

Grant motion to compel, subject to a protective order that: 1) limits the use of the complainants' contact information solely for purposes of the instant litigation; 2) requires Plaintiffs or Defendant BFIC to demonstrate good cause prior to an attempt to contact one or more of the complainants; and 3) requires Plaintiffs and Defendant to provide an "opt-out" notice, pursuant to *Belaire- West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App. 4th 554, prior to any contact with a given complainant.

DISCUSSION

In the instant motion, Defendant BFIC seeks to compel non-party Southern California Air Quality Management District ("the District") to produce the following records:

1. All RECORDS (as used herein, the term "RECORDS" means "Writing" as that term is defined in California Evidence Code section 250, and includes printed and electronically stored information) constituting or referring to odor complaints pertaining to the Sunshine Canyon Landfill from January 1, 2008 to the present.
2. All RECORDS containing the complainant names, addresses, phone numbers, time and/or date of complaint, and/or contents of written or verbal complaints pertaining to the Sunshine Canyon Landfill from January 1, 2008 to the present.
3. All recordings and transcriptions of recordings of phone calls received by the 1-800-CUT-SMOG phone line pertaining to the Sunshine Canyon Landfill from January 1, 2008 to the present.
4. All RECORDS of complaints reported to the SCAQMD online reporting system pertaining to the Sunshine Canyon Landfill from January 1, 2008 to the present.
7. All affidavits and declarations containing or relating to odor complaints pertaining to the Sunshine Canyon Landfill from January 1, 2008 to the present.

EXHIBIT

1

The District has objected to production of any documents containing the names, addresses, or contact information pursuant to the “official information” privilege under Evidence Code §1040.

“‘Official information’ subject to the §1040(b) privilege means information acquired *in confidence* by a public employee in the course of his or her official duty *and* not open, or officially disclosed, to the public *before* the privilege is asserted.” California Practice Guide, Civil Trials and Evidence, ¶8:2391 (The Rutter Group 2013) (citing Evidence Code §1040(a); *Marylander v. Sup. Ct. (Office of Statewide Health Planning & Develop.* (2000) 81 Cal.App.4<sup>th</sup> 1119, 1125) (emphasis in original). The following conditions must be satisfied: 1) the privileges must be claimed by *a person authorized by the public entity* to do so (Ev. Code §§1040(b), 1041(a); and disclosure of the information or informant identity must be *either* (i) *forbidden* by act of Congress or a California statute; or (ii) *against the public interest* “because there is a necessity for preserving (its) confidentiality...that outweighs the necessity for disclosure in the interest of justice.” Ev. Code §§ 1040(b)(1) & (2), 1041 (a)(1) & (2); *Department of Motor Vehicles v. Sup. Ct. (People)* (2002) 100 Cal.App.4<sup>th</sup> 363, 377; *Pierce County, Wash. v. Guillen* (2003) 537 U.S. 129, 145-146.

The public entity must satisfy the threshold burden of showing that the information was acquired in confidence. California Practice Guide, Civil Trials and Evidence, ¶8:2408.5 (The Rutter Group 2013) (citing *Marylander v. Sup. Ct. (Office of Statewide Health Planning & Develop.)*, *supra*, 81 Cal.App.4<sup>th</sup> at 1128-1129.<sup>1</sup>

“The court must then weigh the conflicting interests and may sustain the privilege only if “there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interests of justice.” If necessary to enable it to rule on the privilege claim after the requisite *prima facie* showing is made, the court may hold an *in camera* hearing to review the allegedly privileged information.” California Practice Guide, Civil Trials and Evidence, ¶8:2411.5 (The Rutter Group 2013) (citing *Marylander v. Sup. Ct. (Office of Statewide Health Planning, supra*, (2000) 81 Cal.App.4<sup>th</sup> 1119, 1126-1129). In balancing the conflicting interests, the court must consider the consequences to the litigant of nondisclosure and the consequences to the public of disclosure.” *Id.* (citing *Marylander, supra*, 81 Cal.App.4<sup>th</sup> at 1129).

The consequences of nondisclosure to the litigant include issues concerning the importance of the information to the fair presentation of the litigant’s case, the availability of the material to the litigant by other means, and the effectiveness and relative difficulty of obtaining the information by such other means. California Practice

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<sup>1</sup> If necessary to enable it to rule on the privilege claim after the requisite *prima facie* showing is made, the court may hold an *in camera* hearing to review the allegedly privileged information. California Practice Guide, Civil Trials and Evidence, ¶8:2409 (The Rutter Group 2013) (citing *Marylander v. Sup. Ct. (Office of Statewide Health Planning & Develop.)*, *supra*, 81 Cal.App.4<sup>th</sup> at 1129; *People v. Sup. Ct. (Barrett)* (2000) 80 Cal.App.4<sup>th</sup> 1305, 1317; and *Suarez v. Office of Administrative Hearings (Bennett)* (2004) 123 Cal.App.4<sup>th</sup> 1191, 1193-1194. Here, the Court need not hold an *in camera* hearing to review the information (the issue is simply whether the contact information should be disclosed), and indeed, the parties have not asked for such a hearing.

Guide, Civil Trials and Evidence, ¶8:2411.6 (The Rutter Group 2013) (citing *Marylander, supra*, 81 Cal.App.4<sup>th</sup> at 1129). The consequences of disclosure to the public include matters relating to public processes and procedures. California Practice Guide, Civil Trials and Evidence, ¶8:2411.7 (The Rutter Group 2013) (citing *Marylander* at 1129).

The District is a public entity, and has claimed the public information privilege with respect to any identifying information (addresses, phone numbers, identities, and other contact information) of persons who have complained about the Sunshine Canyon Landfill. As the party seeking disclosure, Defendant BFIC has satisfied its initial *prima facie* showing of a “plausible justification” for the information. The information being sought by BFIC is, at the very least, relevant with respect to class discovery (including the issue of numerosity). As Defendant notes, ¶19 of the Complaint alleges that “[i]n the last several years, [the District] has received in excess of 1,000 complaints from residents concerning the noxious odors emitted from Defendant’s landfill.” [Complaint, ¶19; Declaration of Thomas Bruen, ¶2.] Currently, there are six (6) class representatives who have complained about the landfill whose identities and contact information are known. Defendant contends that the 1,000 complaint number ‘was created by a relatively small number of individuals, many of whom use instant communication tools such as Google email alerts and phone trees to generate multiple complaint calls to the AQMD hotline at the same time, sometimes repeatedly on the same day, to create the false impression that a great many people are complaining about landfill odors and to induce the Air District to issue NOVs.” [Bruen Decl., ¶3.] The discovery of the identities of the complainants may demonstrate whether there was a “phone tree” or an “email tree.”

The burden shifts to the District to show that the contact information was acquired in confidence. The District has met its burden. Nicholas Sanchez, Senior Deputy District Counsel with the District, states that it is the district’s policy to keep the identifying information of complainants confidential. [Declaration of Nicholas Sanchez, ¶6.] Mr. Sanchez also notes that this policy is posted on the District’s website. [*Id.*] The District has consistently asserted the official information privilege when the Landfill has requested complainant names and addresses. [Sanchez Decl., ¶14.]

Defendant BFIC notes that the District’s website states in applicable part:

Do I have to identify myself when I call AQMD to report an air quality complaint?

AQMD staff encourages people to provide their contact information when reporting air quality complaints about businesses, factories and other stationary sources. This information helps us request or verify complaint details with you if needed, and to inform you of the status of complaint investigation activities. AQMD maintains complainant personal information, such as name, address and telephone number, as confidential, to the extent allowed by state and federal law. *Such information may only be released under very limited and unique circumstances, if required by*

*the California Public Records Act or if requested under a subpoena or used in court proceedings.* [Bruen Decl., ¶12 (emphasis added).]

However, the fact that the District's website states that the complainant's information may be subject to subpoena in litigation does not detract from the confidential nature of the contact information. Complainants still have a *reasonable* expectation (not an "absolute" expectation) of confidentiality. Accordingly, the District has satisfactorily demonstrated that the contact information was obtained in confidence.

Since both sides have satisfied their initial burdens pursuant to the test referenced above, the Court must balance the interests in keeping the identities of the complainants confidential against the necessity of disclosure "in the interest of justice." Here, the consequences of nondisclosure of the names, addresses, and telephone numbers of the complainants may very well have an impact on BFIC's rights to class discovery. Defendant BFIC's theory is that there is an organized effort by some individuals to simultaneously report odor complaints for the purpose of creating "evidence" that the landfill's odor abatement efforts have been unsuccessful, and to seek issuance of additional NOVs (Notices of Violation) to the landfill. The identities of the complainants would shed light on whether these complaint numbers are really just driven up by a select few residents in the area. It also would provide a basis for Defendant BFIC to contest numerosity.

The ability to precisely locate where complaints are coming from would be relevant to determining to what extent odors are widespread or found only in discrete pockets in some neighborhoods near the landfill. This would also aid in the commonality analysis.

On the other hand, the District does have a very strong interest in maintaining the confidentiality of complaints regarding air quality violations. Mr. Sanchez notes that the purpose behind the District's confidentiality policy is to encourage individuals to report potential air quality problems to the district. [Sanchez Decl., ¶8.] Sanchez also states that because of the District's limited resources, reports from residents are an important source of information for the District. [*Id.*] These reports steer the District's inspectors toward potential violations, and this assists the District in enforcing its rules more efficiently. [*Id.*] Mr. Sanchez's opinion that individuals might not make such reports if they thought their identities would be disclosed to the public for fear of harassment or other retaliation by the facility of which they complained would *theoretically* stand as a basis for maintaining confidentiality.

Ultimately, however, the balance tips in favor of disclosure, under very specified circumstances. Critically, the proposed protective order does *not*, at the current time, give Defendant BFIC any right to unilaterally contact any of the complainants. The proposed protective order, to the contrary, would prohibit Defendant BFIC, Plaintiffs, and their respective counsel from using the District's information to contact the complainants. The protective order would, in other words, make certain that the contact information would be only for purposes of the litigation. Contact information would not

Plaintiffs and Defendant BFIC. Any such “opt-out” notice procedure, must notify the putative class members that their information would be used solely for purposes of the litigation, and would not be disclosed to any outside sources. Such a provision is a useful addition to the protective order, and provides another layer of protection for the putative class members.

For these reasons, in balancing the respective interests, the balance falls in favor of disclosure. However, the disclosure to BFIC, to Plaintiffs, and their counsel will have to be under specified conditions. The parties are not to use the information for purposes other than the litigation, and may not disclose the complainants’ contact information to any third parties. Further, the complainants may not be contacted by either Plaintiffs or Defendant BFIC, absent a further showing demonstrating a specific need to contact one or more complainants. It is appropriate to include a further provision in the protective order, requiring Plaintiffs and Defendant BFIC to provide an “opt-out” notice (under a procedure similar to that in *Belaire- West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App. 4th 554). This notice gives the complainants the right to “opt-out” of being contacted by any party or their counsel.

#### VI. Conclusion

For the foregoing reasons, the motion to compel is granted, subject to a protective order that: 1) limits the use of the complainants’ contact information solely for purposes of the instant litigation; 2) requires Plaintiffs or Defendant BFIC to demonstrate good cause prior to an attempt to contact one or more of the complainants; and 3) requires Plaintiffs and Defendant to provide an “opt-out” notice, pursuant to *Belaire- West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App. 4th 554, prior to any contact with a given complainant.